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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-493

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO; EDWARD J. CARLOUGH; and DAVID TODD,

Petitioners,

v.

ANTHONY G. PIGNOTTI, as an individual member of Local #3 Sheet Metal Workers' International Association,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

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impressing a trusteeship upon the local and having the trustee refuse to implement the lawful mandate of the vote. 21

V. — There is no provision in the National Labor Relations Act or any other federal labor legislation which prevents a local union member from bringing suit under Section 102 of 501(b) of the Labor-Management Reporting and Disclosure Act to obtain relief against the local and international union officials in respect to activity undertaken by them which is essentially unconcerned with their capacity as collective bargaining representatives but which activity peripherally involves their capacity as collective bargaining representatives. 23

VI. — Federal Courts in evaluating the validity of the conduct of local and international union officials, may make interpretations of the union's constitution, rules of parliamentary procedure, written and unwritten customs or practices where the evidence indicates that the rules and applications thereof are used by the aforesaid officials to deprive the union members rights guaranteed by the Labor-Management Reporting and Disclosure Act. 25

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OPINIONS BELOW

The opinions below are properly described, cited, and set forth in the Petition and its appendices.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is the scope of the fiduciary obligation imposed on union officials by Section 501(b) of the Labor-Management Reporting and Disclosure Act broad enough to cover not only an official's duties relative to union funds, but also other pecuniary and non-pecuniary aspects of his trust?

2. May a union member bring suit under Section 501(b) of the Labor-Management Reporting and Disclosure Act to restore the integrity of the democratic process within the union and to recover allegedly unlawfully deducted pension premiums taken from the paychecks of all local members?

3. Under either Section 101(a)(1) or 501(a) of the Labor-Management Reporting and Disclosure Act, may an international union avoid the mandate of a lawful local union election on an issue of grave importance within the local by the expedient of impressing a trusteeship upon the local and having the trustee refuse to implement the lawful mandate of the vote?

4. Whether any provision of the National Labor Relations Act of or any other federal labor legislation prevents a local union member from bringing suit under Sections 102 or 501(b) of the Labor-Management Reporting and Disclosure Act to obtain relief against local and international union officials in respect to activity undertaken by them which is essentially unconcerned with their capacity as collective bargaining representatives but

which activity peripherally involves their capacity as collective bargaining representatives?

5. Whether in a suit brought under Sections 102 and 501(b) of the Labor-Management Reporting and Disclosure Act, a federal court, in evaluating the validity of the conduct of local and international union officials, may make interpretations of the union's constitution, rules of parliamentary procedure, and written or unwritten customs or practices where the evidence indicates that the rules and the applications thereof are used by the aforesaid officials to deprive union members of rights guaranteed by the Labor-Management Reporting and Disclosure Act?

STATEMENT

The Respondent does not agree with the Statement provided by the Petitioners in their Petition for a writ of certiorari. Although they stick to the basic chronological incidences which occurred during this long Pension Plan fight, the Petitioners give an undeserved tone of innocence to their narrative and mask the continuing ulterior motive behind all the continuing acts of the Union officials involved, and which motive the Courts below found abhorrent. That ulterior motive was, of course, to enforce pension participation upon Local #3 regardless of whether or not the majority of the members wanted it.

Therefore, a short narrative of the Pension Plan controversy, with emphasis upon the illegal motivation and design of the Petitioners and other defendants as found by the District Court and approved upon a careful review of the record by the Court of Appeals, is in order. The Petitioners here are just not allowed the luxury of contesting the facts as the District Court found them to be after four days of trial and the receipt of approximately 130 exhibits of a documentary nature. Additionally, the following is

not a detailed resume of the record, but merely a collection of some of the high points.

The District Court came to the conclusion from facts set forth in its statement of findings of fact that the Petitioners and other defendants not involved in this petition, "early in 1971 set out to obtain participation of Local #3 in the national plan, whether the majority of the union wanted the plan or not." *Pignotti v. Local #3,* 343 F. Supp. 236, 242.

The natural inclination of the Petitioners and other defendants to want to see Local #3 adopt the National Plan is undeniable, and as a matter of fact, the Petitioners frankly state such an inclination in their Petition. The problem comes in assessing the tactics the Petitioners and other defendants used in seeing that the National Plan was adopted.

The Court noted that on March 25, 1971, a motion to accept the National Plan was defeated. As a natural consequence thereof, the members may well have wanted to conclusively determine the fate of other plans, so the more general question, "Does the local want any plan?" was presented to the May 6 meeting. At that meeting the membership defeated the idea of participation in any plan. *Pignotti, supra,* 343 F. Supp. 236, 238-9.

President Brader, whom the District Court found was an active proponent of the Plan and bent on seeing that the National Plan was adopted with or without the consent of the majority, had in his possession at this May 6 meeting a petition for yet another special meeting to reconsider the adoption of the National Plan (*Pignotti, supra,* 343 F. Supp. 236, 238-9). In view of this, he must have been a bit alarmed when James Pignotti

made the motion to indefinitely postpone the pension plan and reference thereto.

Indicative of the quality of available evidence upon which the District Court could have drawn its conclusion that the Petitioners and other defendants herein were out to install the Plan with or without the consent of the members can be found in Tony Pignotti's description of how Brader handled the motion to indefinitely postpone the consideration of the Pension Plan offered by Jim Pignotti. Pignotti made the motion, and Brader called for a vote. From Tony Pignotti's testimony at trial:

"Q. Did you observe what the membership did when he called for a show of hands of those who were in favor of Jim's motion?

"A. Yes, I did, there was loads of hands.

"Q. Okay, did Mr. Brader then call for a show of hands on the people opposed?

"A. Yes, sir.

"Q. What did you observe when Mr. Brader called for a show of hands relative to those against Jim's motion?

"A. Not very many hands.

"Q. Then what transpired?

"A. Then President Brader said that the motion lost. And at that time Dennis Carlson got up and we all looked at each other, 'What the hell's going on?' All these hands that was up and then we lost the motion. Denny got up and he asked the chair for the vote, he wanted to know what the outcome was, how much did we lose by, and

the motion was 29 to knock it down, you know, and 24 for the motion.

"Q. Then what happened after that, now, was that Brader announced it was 29 to 24 vote?

"A. Yes, it was. It seems to me like at the time he announced it — I mean he didn't announce it right (snapped fingers), it was like a couple of seconds and then it was announced and at that time I thought it was Denny Carlson that made the motion that we have a division of the house because, well, we felt that it wasn't a true vote, and he asked for a division of the house, and at that time there was no hesitation at that time either, I mean, I mean that the people were for the motion got up and went to one side and the people that were against it went to the other side and the people that was against the motion gained one more vote and we had 60, I think that was 60 to 30."

(Appendix to Brief of Respondent in Opposition, pp. 1,2.)

The next episode in the pattern of trying to force the Plan upon Local #3 is handled this way by the District Court in its finding of facts:

"In the meantime, Brader frantically sought help from Carlough and received via Lonnie Gaither, assistant to Carlough, the bald conclusion that the motion to divide the house during the May 6, 1971, meeting was out of order. Before the vote could be forced at the May 27, 1971, meeting, a point of order was made that the meeting itself was out of order, since it had been called specially to vote on the pension question and Rule 30 of the Constitution and Ritual controlled. Rule 30 provides that 'When a question has been decided, it can be reconsidered only at the same meeting or on the next regular meeting night.' This not being a regular

meeting, the question could not be reconsidered. Brader overruled the point of order. The ruling of Brader was challenged by the membership, and the challenge was sustained upon vote of the members.

"Brader was undaunted by this third defeat of the pension plan within as many months and again besought Carlough to personally intervene, which Carlough did by using his power as general president to call yet another meeting, this time for June 21, 1971, to vote again on the national plan."

Pignotti, supra, 343 F. Supp. 236, 239.

This call for the vote which was ultimately successful deserves a little bit of analysis. The April 6 meeting had already arguably settled the question that the Local did not want the International Plan. One would think that the resurrection of *that* plan would be unfair in and of itself. Moreover, the May 6 meeting indicated that no plan was wanted and the motion to indefinitely postpone gave a further indication of the sentiment of the Union to end the discussion of pension plans.

The May 27 meeting was properly ruled out of order because of Rule 30 and May 27 not being the next regular meeting night after May 6. Additionally, the June 21 meeting called by Petitioner Carlough was in obvious violation of Rule 30 in that it was even farther removed from being the "next regular meeting night." The District Court, in hearing the entire body of evidence from the beginning of the controversy in early 1971 to its conclusion with the trusteeship in early 1972, found very clearly what was going on at this time. One would have to be naive not to believe what the Court found; that is, that the Petitioners and other defendants were going to get that Plan through no matter what.

On June 23, 1971, Defendant Forman refused to take two petitions for a reconsideration, one insufficiently worded. Also, about this time Business Agent Forman visited Tony Pignotti at his job site and told Pignotti to keep his mouth shut, that the International could fine him if it chose. *Pignotti, supra,* 343 F. Supp. 236, 240.

On July 15, 1971, the Local President Brader was presented with a petition to reconsider the participation which was to begin August 1. Brader accepted it but said it was too late. The Plaintiff Pignotti and others tried on succeeding nights to get Brader to honor the petition, but it proved fruitless. On July 26, 1971, Jim Pignotti and 113 other members filed suit in Federal District Court to enjoin the commencement of deductions and to require Brader to honor the petition for another vote. The suit failed to state a cause of action. (It was not a Labor-Management Reporting and Disclosure Act suit.) It should be noted that the Petitioners and defendants vigorously defended against the suit, the prayer of which was to hold another vote.

The Petition states that after the first suit Brader voluntarily decided to hold another vote. The District Court does not describe Brader's actions as voluntary. The record made it clear that the inclination of the Local officers was not to honor the request for another meeting (Appendix, pp. 2, 3, 4). The District Court could well have found from various other items of evidence in the record that Brader finally came to honor the petition when hounded into doing so by numerous supplications by Jim Pignotti, Tony Pignotti, and others.

At a singularly large turn-out October 22, 1971, the Local turned down the National Plan 175-119. The District Court

found that the Local union officers thereafter did not take sincere action to try to end the Plan. There is a little sideline in the case at this point which showed the mentality of the pro-Plan Local officers at this time. Jim Pignotti had told a local newsman the results of the October 22, 1971, vote. The executive board, on which Brader and Forman served, filed charges against James Pignotti claiming that he "engaged in conduct which is detrimental to the best interest of the association or any subordinate unit thereof or which will bring said union into disrepute." *Pignotti, supra,* 343 F. Supp. 236, 240, 241. Such a little item couldn't help but make the District Court feel that the Petitioners were not above coercion tactics to intimidate the anti-Plan members.

The Court found that the undersigned attorney wrote to Petitioner Carlough on November 30, 1971, saying that suit would be filed but would be stayed if the necessary acts to terminate the Plan were completed by December 15, 1971. On December 1, 1971, the Executive Board of the Contractor's Association met and requested that the Union make its request to delete the Plan in writing, that the contractors be released from liability, and that the Pension Plan would not be reinstated during the life of the contract which was to end approximately six months later. At this point the Local officers went to their local attorney and asked his opinion of the requirements. He wrote an opinion letter (Appendix B to Petition, p. 9) which stated that there were possible problems in ending the Plan from third-party beneficiaries earning vested rights in the Plan. In spite of the fact that the Local officers knew or easily could determine that no third-party beneficiaries could possibly be in existence at that time because 1200 hours of participation in the Plan were required before any rights vested, the Local officers probably planned to use that obviously faultily reasoned letter as an excuse to continue the Plan.

By this time, things were in the mill that made the Weinberg letter superfluous anyway. President Carlough had appointed David Todd to take over as trustee, which he did. The Petitioners at this point in time now try and cast Todd's decision to continue participation in the Plan as merely a routine, independently-arrived-at decision. The record doesn't support it, and the Court didn't find it. As a matter of fact, the Court did find that at Todd's first meeting, the reading of the Weinberg letter appearing in the Appendix to the Petition and the reading of the letter by the undersigned attorney dealing with the fact that there was no third-party beneficiary problem because 1200 hours had not been worked yet by any member of the Union, led to a lengthy discussion of the Plan on how the October 22, 1971 vote could be implemented. The Court found that Todd had stated at the meeting that he was willing to let the members do anything they wanted to do about the Plan, but during the discussion, a motion was made that the Local attorney and the undersigned attorney would get together at Union expense to implement the October 22, 1971 vote. Todd said that the Plan was going to be left alone, negotiated into the new contract, and the members would not be allowed to vote to ratify the contract. *Pignotti, supra,* 343 F. Supp. 236, 241. Thus, it just is absolutely not fact, nor was there anything in the record that indicated that Todd made his decision as to continuation of the Plan as just merely an incident of his job as trustee. The record totally supports the District Court's conclusion:

> "The Court is convinced that the purpose of the trusteeship was to prevent any further action of the members towards implementation of the vote to discontinue the Plan." *Pignotti v. Local #3,* 343 F. Supp. 236, 243.

In conclusion, the real error that should be pointed out in the Statement offered by the Petitioners in their Petition for Writ of Certiorari is that the Petitioners' narrative totally avoids the real crux of this lawsuit and the real evil that the District Court was striking out at in its decision. The Petitioners herein and the defendants who did not join in this Petition were not merely embarked upon a series of individually isolated, independent decisions and incidences which fortuitously resulted in the Plan being implemented and retained. The District Court found an ill and evil motive and pattern to deprive the members of Section 101 and Section 501 rights. The Court found that Union officials, whether motivated by arrogance, insensitivity, institutional inertia, the good of the members or whatever, determined that Local #3 was going to adopt the National Pension Plan, and then they proceeded to make self-serving interpretations of their own rules, ignore other rules, and cause implementation of the Plan over the clearly expressed dissent of the majority.

Recognizing that all this is what the District Court found upon four days of trial and about 130 exhibits, the Questions Presented recited in the Petition become quite simple to answer.

REASONS FOR NOT GRANTING THE WRIT

I.

The decision of the District Court as affirmed by the Eighth Circuit, when limited to its strictly section 101(a)(1) grounds, is totally dispositive of the controversy herein; therefore, in granting this writ on section 501(a) grounds, the Supreme Court would be merely entertaining a moot question insofar as the disposition of this law suit is concerned.

The District Court handled this controversy by giving

certain relief premised on both Section 101 and Section 501 grounds.

> "Here, the Court, in accordance with the principles of the foregoing decisions, will grant the following relief for the proven violations of 411 and 501 [Section 101 and Section 501] by the defendants . . ." *Pignotti, supra,* 343 F. Supp. 236, 244.

That reasoning for the relief was not disturbed by the Eighth Circuit other than to the extent that all the parties to this lawsuit agree that Section 501(b) provides no basis for granting relief against the labor organizations, the International and the Local:

> "Initially all parties agree that neither the International Association or Local #3 have violated Section 501 as that section imposes liability only on the individual union officials." *Pignotti v. Local #3,* 477 F.2d 825, 832 (CA8, 1973)

Thus, Section 101(a)(1) forms the adequate basis for the Respondent's total relief in all its aspects as awarded by the District Court.

The Petition for a Writ of Certiorari makes no strong showing that both the District Court and the Court of Appeals did not make a totally accurate assessment of the Section 101(a)(1) aspects of this particular case.

Given the facts as the District Court found them, i.e., the Petitioners and other defendants set out to cause participation in the National Plan with or without consent of the majority of the union, a clear, uncontroverted violation of Section 101(a)(1) was found.

Section 101(a)(1) reads:

> "Every member of a labor organization shall have equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organization, to attend membership meetings, and *to participate in the deliberations and voting upon the business of such meetings,* subject to reasonable rules and regulations in such organization's constitution and by-laws." (Emphasis supplied.)

Certainly it cannot be argued that Section 101(a) is not violated when union officials contrive a scheme to force an important decision on the union against the will of the majority and use the rules and regulations of the organization merely to subvert efforts of their antagonists to upset the illegal scheme.

Accepting the facts as found by the District Court, then it is abundantly clear that the Eighth Circuit's handling of the Section 101 issue was totally accurate and consistent with the only logically available interpretation of Section 101(a)(1):

> "Appellants cite *Vestal v. Hoffa,* 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972) for the proposition that the union officials and not the courts are the proper parties to interpret the union's constitution. We agree generally with this proposition of law, provided, as recognized in *Vestal,* that the interpretations are fair and reasonable. But we also recognize, as did the Court in *Sabolsky v. Budzanoski,* 457 F.2d 1245 (3d Cir.), *cert. denied,* 409 U.S. 853 (1972) that 'Courts have not hesitated to strike down so-called 'authorized' union conduct alleged to be based on a rule or by-laws fairly interpreted, where such conduct violates the provisions of the Landrum-Griffin Act.' . . . In our own case of *Johnson v. Nelson* . . . we cut past the question of whether the interpretation of the by-laws and constitution of a union was 'authorized' to determine whether the conduct of the union officials, in refusing to act

according to the majority vote of the membership, constituted a violation of their Section 501 fiduciary duties. *The Act does not permit the violation of rights guaranteed to union members under Section [101] upon a showing that the violation was in accord with the union's constitution and by-laws." Pignotti, supra,* 477 F.2d 825, 831. (Emphasis supplied.)

Other portions of this argument will make it even clearer that the Courts below were absolutely correct in their handling of the 101 aspect of this case and that the Petitioners are really only quibbling with the District Court's factual finding of a design by the Petitioners and other defendants to force the Plan on the membership regardless of majority dissent thereto.

For the Supreme Court to grant this Writ would cause it to merely entertain the 501 issue here, and operating on 501 alone, the Supreme Court could do nothing to disturb the disposition of the entire controversy as it was arrived at by the District Court below and approved by the Eighth Circuit. No aspect of the District Court's relief would be altered by an adverse 501(b) decision at this level. That would mean that the Supreme Court would be entertaining the suit merely for the purposes of solving a moot question and not for adjusting any rights or making any change in the disposition of the controversy. Because the 101 aspects of the case were properly handled and disposed of all aspects of the controversy, hearing this matter would merely have the Court handle this case for its 501 academic value.

II

The scope of the fiduciary obligation imposed on union officials by section 501(b) of the Labor-Management Reporting and Disclosure Act covers not only an official's duties relative to union funds and property but also covers other pecuniary and non-pecuniary aspects of such officials' trust.

The first question presented by the Petitioners is very likely the only serious point in their favor in trying to obtain a Writ of Certiorari. In their first "Question Presented," they suggest that the proper interpretation of the Labor-Management Reporting and Disclosure Act, particularly 501(b) thereof, requires that a very narrow view of the fiduciary duty of a union official was contemplated by Congress in passing the Act. For years, the Second Circuit has been committed to this narrow interpretation that would have a union official's fiduciary obligations under 501 be limited strictly to an official's handling of the union property or funds. The other side of this issue is the position of the Eighth Circuit, which holds that Section 501(b) contemplates a fiduciary obligation that extends well beyond the handling of the money and property of the union, but covers both pecuniary and non-pecuniary aspects of a union official's trust to his members.

The above conflict is not of recent vintage. The Eighth Circuit first enunciated the principle that the fiduciary duty is broad in scope in 1963 in *Johnson v. Nelson*, 325 F. 2d 646. The following year the Second Circuit arrived at the narrow scope position in *Gurton v. Arons*, 339 F. 2d 371.

Federal labor law has survived this nine-year dichotomy without need to resolve it in the Supreme Court. It may well be that after the Third Circuit decided *Sabolsky v. Budzanoski*, 457 F.2d 1245 (C.A. 3, 1972) that the Supreme Court had an

opportunity to consider whether or not the conflict between the broad scope versus narrow scope interpretation should be resolved. This writer is without the research capability to determine the fact of the matter. However, the United States Supreme Court may have been invited at that time to resolve the conflict and decided not to, as certiorari was denied October 10, 1972, at 34 L.Ed.2d 96. It would be appreciated if the reader reviewing this brief would determine if the Court has at least that time passed up the opportunity to speak out on the conflict.

The best reason why a Writ isn't required to straighten out the inconsistency between the Second Circuit and the Eighth and Third Circuits is because any confusion that may have resulted is being resolved on its own. Contrary to the position of the Petitioners who claim that *Sabolsky* stood for the broad interpretation only in dicta, the Third Circuit was clearly not indulging in dicta but ruling on the merits of the issue and reversing the district court on its broad versus narrow stand:

> "The district court found that the complaint does not contain allegations of failure to hold money or property for the benefit of the organization nor of any expenditure not authorized by the constitution, by-laws or resolutions, and that Section 501(b) remedies are only available as a cause of action dealing with the fiduciary responsibility with respect to the money or property of the union. We read the complaint as setting forth allegations regarding the holding and expenditure of union funds. *Moreover, we disagree with the court's reading of the scope of Section 501." Sabolsky v. Budzanoski,* 457 F.2d 1245 at 1250. (Emphasis supplied.)

Then the Third Circuit goes on to cite the history of the Act and points out the historical error of the Second Circuit's *Gurton* decision:

"A complete study of that history reveals that Senate Bill 1555 was amended by H.R. 8342 and as finally enacted, extends the fiduciary principle to all of the activities of union officials and other union agents or representatives . . . and that Section 501 attempts to define in the broadest terms possible the duty which the new federal law imposes upon a union official." (457 F.2d 1245 at 1250).

The Eighth Circuit in the instant case very carefully traced the legislative history of 501(b) and isolated and identified in precise, unequivocal language the glaring error of the *Gurton* decision's legislative history and then commented:

"From this outline it can be seen that the consideration of the remarks of Senators McClellan and Irvin in regard to Section 501 of S.1555 would tell us nothing about the legislative history of Section 501 as finally passed. Without further reference to the legislative history of the Elliot bill which was incorporated in the Landrum-Griffin Bill and became the Law, the quoted material shows that the Elliot bill strongly favored the broad scope application of the fiduciary provisions of 501(a) and not the narrow provisions referred to in the remarks of Senators McClellan and Irvin.

"Based on the history outlined above, it appears clear that *Gurton v. Arons, based as it was on the legislative history of the Kennedy-Irvin bill which was amended out of existence, was unduly restrictive of the scope of the fiduciary duties of union officials commanded by Section 501* and that *Johnson v. Nelson,* basing its decision on the legislative history of the Elliot bill, was properly decided." *Pignotti v. Local #3,* 447 F.2d 825, 834. (Emphasis supplied.)

It is suggested that now the clear error of *Gurton* has been pointed out by *Sabolsky* and *Pignotti* that it is only a matter of time and the opportunity to litigate the issue in other cases until

Gurton with its poor reasoning suffers a natural death and receives a decent burial.

If the Court is not inclined to let *Gurton* die a natural death, there is an equitable consideration that requries that this case is not the occasion to decide one way or the other. The Supreme Court, on some other occasion, will be invited to resolve this issue. [The Petitioners cited *Morrissey v. Curren,* — F.2d —, 83 L.R.R.M. 2950 (C.A.2, June 18, 1973). It may well be that that particular case now sits on a petition for a writ of certiorari raising this conflict of broad versus narrow scope.] There may be others right now before the Court. There certainly will be some in the next few years.

If the Court is not disposed to let *Gurton* die a natural death, then it should wait for a more appropriate case. In this case right today Tony Pignotti and over 500 other members are contributing 20 cents an hour from their own wages for every hour worked, as they have continued to do ever since this Plan was unlawfully impressed upon them in the summer of 1971. They are waiting to get their money back. Most of the money is in a special fund, and an end to this appeal will start the process of returning the money quickly.

The members of Local #3 obviously and understandably want their money back. They don't want to wait another year on a decision from the Supreme Court. In view of what was said in the immediately preceding portion of this particular brief, namely, that the 101 aspect of the Petitioners' case is so weak, that the 501 aspect becomes moot, there is no reason in fairness why the Supreme Court shouldn't wait for the next case if it really feels *Gurton* has to be executed as opposed to dying a natural death.

The opportunity will shortly come again when the issue isn't moot. There is no reason for 500 hard-working union members to sit by and continue to contribute and have their refund delayed that much longer, while lawyers and judges thrash out a totally academic question on 501, a decision either way on which would not affect the District Court's relief in the slightest, adequately based as it was on 101.

III.

A union member may bring suit under section 501(b) of the Labor-Management Reporting and Disclosure Act to restore integrity of the democratic process within the union and to recover allegedly unlawfully deducted pension premiums taken from the pay checks of local members.

The Petitioners argue that the monetary relief sought and obtained by the Respondent was for the benefit of only himself and certain other Union members. The first thing that should be noted is that the order of the District Court will return all of the money to all of the members of the Union from whom deductions are taken.

At one point in its Petition, the Petitioners point out that Local #3 is divided into two parts: production workers and construction workers. As a practical matter, the record established that the two divisions are in practice very well isolated and separated. The Pension Plan applied only to the construction members, and the deductions come from the wages of every member of the construction division. The votes and meetings discussed heretofore all involved only meetings of the construction group. The groups do not have joint meetings. Each one of those men, if the District Court's relief is put into effect, will recover his money; so the relief is in effect union-wide in

relationship to the pension controversy and the people caught up in that controversy.

The argument can be made that a return of wrongfully taken money to each member of the union does "benefit the organization" as that language is used in Section 501(b) where "Suit is permitted in any district court . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the organization . . ." It is logical to argue that if all of the members of a union are restored to them monies wrongfully taken, that yields a direct benefit to the labor organization as a whole, especially in terms of the espirit d'corps amongst the men for the organization.

The *Phillips v. Osborn*, 403 F.2d 826, reasoning unduly restricts the meaning of "To recover damages or secure an accounting or other appropriate relief for the benefit of the organization." The restriction is a natural consequence of that Court's adopting (for *Phillips* only) the narrow view of 501 which we have heretofore demonstrated is in error. If one accepts that the fiduciary duty of a union official transcends merely his duty over the money and property of the union, then it is obvious that the language, "Benefit of the labor organization" is likewise not restricted to benefits merely enhancing the coffers of the union.

The Eighth Circuit's handling of this problem is correct. That Court didn't bother to criticize the thinking of *Phillips*, merely distinguish it:

> "We need not decide whether *Phillips* was correctly decided as the instant case is easily distinguishable as to the relief requested of the court. The restoration of the orderly democratic processes to the local union is clearly a benefit to the labor organization and a proper subject of concern to the entire membership." *Pignotti v. Local #3*, 447 F.2d 825, 835.

IV.

An international union may not avoid the mandate of a lawful union election on an issue of grave importance within the local by the expedient of impressing a trusteeship upon the local and having the trustee refuse to implement the lawful mandate of the vote.

The Petitioners claim that the Court of Appeals held that a trustee is bound by and has an obligation to implement the purpose of the membership vote taken prior to the imposition of the trusteeship. The Petitioners further claim "This was a sheer fabrication on the part of the Courts below in an attempt to obligate Trustee David Todd to take specific affirmative action on a collective bargaining issue, on which he has discretion to act in various ways, provided only that he must exercise his authority to bring about a result that he believes to be in the best interests of the union." (Petition, p. 15)

The error of the Petitioners here is clear. They are acting as though the Court had come up with a finding that Trustee Todd was totally innocent and fairly motivated in his activity in refusing to implement the October 22, 1971 vote. However, the District Court found absolutely to the contrary. The Court stated that it was convinced that Todd's reason for being appointed trustee by Carlough was to seal the Union into the Plan. The evidence doesn't have to be repeated. The Petitioners have no right to pretend as though the Court didn't make that finding.

The Courts below have merely stated the obvious. The Courts below were not going to give international unions a tool in the Act's trusteeship provisions that could be effectively used by an international union to totally destroy all the protections of the other sections of the Act.

The Eighth Circuit pointed out that "29 U.S.C. 466 provides that the remedies provided by the subchapter of which it is a part which includes 29 U.S.C. 464, are not exclusive. Thus the right to sue under 29 U.S.C. 412 is not affected by the right to attack trusteeships under 29 U.S.C. 464." *Pignotti* at 477 F.2d 831. Most assuredly the trusteeship provisions of the Act are not the premier aspects of Landrum-Griffin to which all other provisions are subordinate.

What the Petitioners urge here is that the Supreme Court create a monster that could destroy the entire fabric of the Labor-Management Reporting and Disclosure Act:

> "The Congressional impositions of fiduciary obligations upon agents and officers of unions would be meaningless if all of these duties could be abrogated by the mere device of imposing a trusteeship. Past wrongs call for a remedy, not technical objections." *Pignotti v. Local #3*, 477 F.2d 825, 832.

The District Court and the Court of Appeals found that serious 101 and 501 violations took place. The Petitioners invite the Supreme Court to create a technique whereby internationals can effectively instigate and perpetuate such violations. The invitation so tendered is easily rejected.

V.

There is no provision in the National Labor Relations Act or any other federal labor legislation which prevents a local union member from bringing suit under Section 102 or 501(b) of the Labor-Management Reporting and Disclosure Act to obtain relief against the local and international union officials in respect to activity undertaken by them which is essentially unconcerned with their capacity as collective bargaining representatives but which activity peripherally involves their capacity as collective bargaining representatives.

The Petitioners argue that because the Local officers were duly elected collective bargaining representatives, their activity in causing the Plan to be implemented and then causing it not to be dismantled were totally protected from the reach of the Labor-Management Reporting and Disclosure Act, because in doing those various acts they were merely carrying on activity as collective bargaining representatives.

Once again, the false premise upon which Petitioners proceed is that they are not living with the facts as found by the District Court and approved by the Eighth Circuit. The essence of their activity here did not concern their obligations as collective bargaining representatives. The essence of their activity as found by the Court was an illegal effort to force Local #3 to accept the National Plan no matter what. The Eighth Circuit dismissed this contention rather quickly:

> "Appellants collective bargaining argument is that participation or non-participation in the pension plan is a collective bargaining issue rather than an internal union issue and that only internal union issues are the proper concern of the Landrum-Griffin Act. This argument is not well taken. The action seeks to preserve the democratic

processes in Local #3, a proper subject of concern under the Landrum-Griffin Act. The issue raised is whether the method used by union officials to secure the Local's participation in the Plan violated Sections 411 and 501 of the Act." *Pignotti v. Local #3*, 477 F.2d 825, 831.

The Petitioners on this particular issue have said that, "The Court should rule on this point in the interest of harmonizing the variant labor policies under these two federal acts." (Petition, p. 17.) There is no need for the Court to so act in this case because it is clear that the Petitioners are proceeding on the false premise that the Courts below viewed their activity as essentially activity of collective bargaining agents and proceeded to rule as it did anyway. The truth of the matter is that the Courts below viewed the activity not as collective bargaining activity but as a broader scheme of activity aimed at unlawfully trying to impose the pension upon the Union, and in so doing petitioners and defendants committed acts which were sometimes connected with collective bargaining activities, sometimes connected only with their duties as moderators of meetings or record keepers, or whatever, but that all these various sub-activities fitted into an overall scheme of activity unlawful under the Labor-Management Reporting and Disclosure Act. Only a portion of that activity constituted collective bargaining representation (that portion being the most obnoxious to L.M.R.D.A. principles; to-wit: actually implementing into the contract and preserving there the lawlessly achieved participation in the pension).

VI.

Federal courts in evaluating the validity of the conduct of local and international union officials, may make interpretations of the union's constitution, rules of parliamentary procedure, written and unwritten customs or practices where the evidence indicates that the rules and applications thereof are used by the aforesaid officials to deprive the union members rights guaranteed by the Labor-Management Reporting and Disclosure Act.

The Petitioners, when one gets right down to the heart of their position, argue that the Union officials charged with wrongful conduct should themselves be the sole arbiter of whether or not they are fairly and reasonably interpreting their own rules and regulations. The Petitioners would have the General President of the International himself be the final say on whether or not the scheme or activity involved in forcing this Plan on Local #3 was a violation of Sections 101(a)(1) or Section 501(b). The very idea is fatuous.

The Petitioners cite *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971) as authority for the proposition that the courts are not entitled to interpret union rules and regulations. *Hardeman* doesn't stand for that position at all. *Hardeman* stands for the position that federal courts should evaluate union procedures to see that they do not violate any provisions of the Labor-Management Reporting and Disclosure Act. As a matter of fact, the Court specifically holds that in enacting Section 102, Congress clearly indicated a purpose to refer L.M.R.D.A. violations to the District Courts for their scrutiny:

> "Those factors suggesting that resort must be had to the administrative process are absent from the present case. *The*

> ***fairness of an internal union disciplinary proceeding is hardly a question beyond the 'conventional experience of judges,'*** **nor can it be said to raise issues within the 'special competence of the N.L.R.B.' . . . As we noted in that case, the 86th Congress which enacted 101(a)(5) was plainly of the view that the protections embodied therein were new material in the body of federal law . . .** ***And in Section 102 Congress has clearly indicated a purpose to refer claims regarding the violation of Section 101(a)(5)*** **[due process in union discipline] to the district courts."** ***Hardeman, supra,*** **401 U.S. 233, 238-9. (Emphasis supplied.)**

As opposed to the position that the federal courts must keep hands off of consideration of internal union rules, the mandate of Section 102 is clear that they should survey them. The only rule courts should observe is that unions should be autonomous and that reasonable, lawful, internal activity on the part of the unions and officers shouldn't be disturbed by courts.

This Court, in *Hardeman,* then proceeded to make an inquiry into whether or not the union, in applying its rules, regulations, and disciplinary processes, did or did not violate the requirements of the Labor-Management Reporting and Disclosure Act relative to due process in union discipline. The Court went on to specifically test whether or not Hardeman received adequate notice of the charges against him, adequate notice being a requirement of Section 101(a)(5)(a). The Supreme Court again tested whether or not there was *sufficient evidence to warrant the disciplinary finding against Hardeman and concluded that there was.* Thus *Hardeman* just does not stand for the proposition that union officials are to be the sole and final arbiters of whether or not they are applying their rules fairly or unfairly. Such a position is ludicrous because once again it would create within the very language of the Act the tool by which the

whole intent and purpose of the Act could be sabotaged by unscrupulous union officials.

Once again it is easy to find the source of the Plaintiffs' error. Their problem is that they refuse to be saddled with the facts as they were found, which is not a liberty they are allowed to take at this stage of the proceedings. The Eighth Circuit, on a review of the District Court record, found specifically that the Union officials had in fact unfairly handled the pension issue and used their own rules and regulations to perpetuate a denial of the democratic process within Local #3:

> "Appellates cite *Vestal v. Hoffa*, 451 F.2d 706, 709 (6th Circ., 1971) *cert. denied*, 406 U.S. 934 (1972) for the proposition that union officials and not the courts are the proper parties to interpret the union's constitution. We agree generally with this proposition of law, provided as recognized in *Vestal* that the interpretations are fair and reasonable." 477 F.2d 825, 831.

The Eighth Circuit then went on to point out that they did not feel that the Union's handling of its own regulations here was fair or reasonable and the effect of the application of said rules, though "authorized," was to cause substantial violations of 101 and 501(b). The Eighth Circuit took time to foot-note one very glaring of many glaring examples of unfair treatment of the members due to the Union officials' procedural decisions:

> "Nevertheless, it appears that the district court's finding that the plaintiff and the anti-pension group were unfairly treated by the union's procedural decisions is correct. An example of this is the union's position that the vote favorable to the plaintiff on the motion to postpone indefinitely was improper because the chair had already announced the vote. The primary purpose of the call for division of the house is to test the chair's announcement of the vote in situations such

as this where the chair's announcement is obviously incorrect." *Pignotti v. Local #3*, 477 F.2d 825, 831, footnote 6.

The District Court and the Eighth Circuit below were merely exercising the mandate of Section 102 that authorizes lawsuits in federal district courts where 101 and 501 violations are alleged to have occurred. The Court here showed the appropriate restraint and respected the tension that has developed over the years as to whether or not the courts should quickly meddle with internal union processes or lay back and correct only the most egregious. It is submitted that in this particular case the Courts below showed restraint and were merely correcting the most egregious of 101 and 501 violations.

CONCLUSION

For all of the reasons previously stated, it is respectfully urged that the Court deny the Petition for a Writ of Certiorari.

Respectfully Submitted:

EDWARD F. FOGARTY
700 Service Life Building
Omaha, Nebraska 68102
Attorney for the Respondent.

APPENDIX

Excerpts from Pages 84 and 85
of the
Transcript of Trial
Testimony
of
Anthony G. Pignotti

Q. Did you observe what the membership did when he called for a show of hands of those who were in favor of Jim's motion?

A. Yes, I did, there was loads of hands.

Q. Okay, did Mr. Brader then call for a show of hands on the people opposed?

A. Yes, sir.

Q. What did you observe when Mr. Brader called for a show of hands relative to those against Jim's motion?

A. Not very many hands.

Q. Then what transpired?

A. Then President Brader said that the motion lost. And at that time Dennis Carlson got up and we all looked at each other, "What the hell's going on?" All these hands that was up and then we lost the motion. Denny got up and he asked the chair for the vote, he wanted to know what the outcome was, how much did we lose by, and the vote was 29 to knock it down, you know, and 24 for the motion.

Q. Then what happened after that, now, was that Brader announced it was 29-24 vote?

A. Yes, it was. It seems to me like at the time he announced it — I mean he didn't announce it right (snapped fingers), it was like a couple of seconds and then it was announced and at that time I thought it was Denny Carlson that made the motion that we have a division of the house because, well, we felt that it wasn't a true vote, and he asked for a division of the house, and at that time there was no hestitation at that time either, I mean, I mean that the people that were for the motion got up and went to one side and the people that were against it went to the other side and the people that was against the motion gained one more vote and we had 60, I think, I think that was 60 to 30.

Plaintiff's Exhibit 66 from Transcript of Trial

Minutes of Executive Board Meeting
September 14, 1971

Special Executive Board Meeting September 14, 1971

President Brader opened the meeting at 7:30 P.M. Others present were Jim Merwald, Pete Kanger, Dewey Stewart, Bob Haty, Les Forman and myself.

Motion by Jim Merwald Second by Les Forman to follow the advice of attorney Weinburg not to honor the petition requesting another meeting to vote on reconsidering the pension plan. Carried, Merwald, Kanger, Haty, Forman and myself for. Brader and Stewart opposed.

Motion by Walt Brader Second by Jim Merwald to make an addition to the referal card, "I will go out of town or I will not go out of town." carried unanimous.

Motion by Dewey Stewart Second by myself to inform the police that our minute book is missing and presumed stolen: Carried. Forman opposed.

Motion by Les Forman Second by Dewey Stewart that he be reimbursed for rewriting the minutes from notes. carried

Motion by Dewey Stewart Second by Jim Merwald to adjourn

Carried 10:00 P.M.

Respectfully Submitted

Donovan H????
Recording Secretary

Plaintiff's Exhibit 67 from Transcript of Trial

23 September, 1971

Mr. Walter Brader
6010 Charles
Omaha, Nebraska

In Re: Pignotti, et al vs.
Local #3, et al

Dear Mr. Brader:

James Pignotti informs me that at a recent executive

council meeting of the Local the status of the above-captioned case now on file in the United States District Court for the district of Nebraska was discussed. He stated that the impression of several board members including yourself was that the case was going to be appealed to the Eighth Circuit Court of Appeals.

I write this letter as the attorney for Mr. Pignotti and several others. I have unequivocally advised them not to appeal the case to the Eighth Circuit. I have unequivocally let them know that such an appeal would be futile. They have unequivocally agreed with my decision. There will be no appeal to the United States Circuit Court of Appeals of the decision by Judge Denny.

Furthermore, I have told them that they will probably get their best results if they try and prevail upon the local leadership here to honor the petition. They have told me that you have at no time unequivocally refused to hold the election and have even indicated that you might be willing to honor their petition. They now seek at the local level the honoring of their lawful petition. Any refusal to honor that petition based in whole or in part upon the notion that the local should refrain from taking action because of the possible appeal is totally without merit. THIS CASE IS NOT BEING APPEALED.

Yours very truly,

Edward F. Fogarty

EFF:mgs